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No. 94-1127

In the Supreme Court of the United States

OCTOBER TERM, 1994

VICTORIA M. VOGE, PETITIONER

v.

JOHN H. DALTON, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ANTHONY J. STEINMEYER
MARC RICHMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether the failure of the court of appeals to discuss in its opinion an issue that was briefed by petitioner and that was fully addressed at oral argument constitutes a denial of her right to appeal on that issue.

2. Whether the court of appeals and the district court erred in failing to reverse the decision of the Board for Correction of Naval Records because of the Board's alleged failure to take into account certain evidence submitted by petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unreported. The district court's order and oral decision dated January 12, 1990 (Pet. App. 7-8, 9-30) are unreported. The district court's post-remand order and memorandum dated October 13, 1993 (Pet. App. 31, 32-36) are also unreported. The opinions of the Board for Correction of Naval Records dated February 4, 1986 (Pet. App. 37-52), October 5, 1990 (Pet. App. 53-55), and March 4, 1993 (Pet. App. 56-58) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1994. A petition for rehearing was denied on September 26, 1994. Pet. App. 6. The petition for a

writ of certiorari was filed on December 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an M.D., is an active-duty commander in the Navy Medical Corps. In 1981, she was assigned to the Naval Regional Medical Center (NRMC) in Guam as the Director of a branch clinic and was granted temporary clinical privileges as a flight surgeon. Those privileges were eventually revoked, however, and her application for permanent privileges denied, after doubts arose concerning her medical competence in the areas of clinical judgment and patient care. The lack of confidence in petitioner's professional abilities stemmed from a series of events, including her unorthodox suturing of a hand tendon injury; her cursory referral to the X-ray department of a patient who had multiple facial lacerations and trauma and was vomiting blood; her prescription for a child of an unusually high dose of a drug with potentially serious side effects; and her decision to permit enlisted male medical technicians to perform unsupervised gynecological pelvic examinations on active-duty and dependent females. CA JA 78, 103-105, 111, 113, 128.[1] Those incidents were reflected in three adverse fitness reports covering periods between October 31, 1981, and March 31, 1983. *Voge* v. *United States*, 844 F.2d 776, 777 (Fed. Cir.), cert. denied, 488 U.S. 941 (1988); CA JA 109-111, 126-128, 161.

During her first two months at the clinic in Guam, petitioner was questioned by her commanding officer and the director of clinical services about some of her

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[1] "CA JA" refers to the joint appendix filed in the court of appeals.

medical decisions in an attempt to discover and remedy petitioner's problems. CA JA 77. Although she responded to their questions with rational, logical explanations of her conduct, petitioner "avoid[ed] accepting any inappropriateness of her decisions," rationalizing that "any errors were due to interpersonal difficulties or disloyalty of her co-workers." *Ibid.* She indicated that she believed her difficulties were caused by discrimination by her commanding officer and by the Navy Bureau of Medicine (BUMED). Citing the adversarial nature of her relationship with BUMED during a previous assignment for which she evaluated flight surgeons and squadron safety, petitioner claimed that BUMED had informed the command at Guam that she was a troublemaker. *Ibid.*; *id.* at 85.

Those events led petitioner's commander to refer her for a psychiatric evaluation on April 12, 1982. CA JA 77-79. She was asked by Capt. Charner Bramlett to see Lt. Commander Eugene Tinelli, the staff psychiatrist, and petitioner did so. Dr. Tinelli drafted a preliminary medical synopsis containing his preliminary clinical impression that petitioner suffered from a "[p]aranoid personality, * * * manifested by oversuspiciousness, hypervigilance, and restricted affectivity." *Id.* at 79.[2] Dr. Tinelli recommended that petitioner receive a complete psychiatric evaluation by the psychiatric department of the NRMC in San Diego. *Ibid.*

Petitioner subsequently spent a month at NRMC-San Diego under observation. Although the NRMC's

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[2] Personality traits are an individual's long-term patterns of perceiving and relating to environment and self. When such traits are inflexible and maladaptive and cause significant functional impairment or great internal distress, they are viewed as personality disorders. Pet. App. 65-66.

primary diagnosis was "[n]o diagnosis," and petitioner was found "psychiatrically fit for return to full duty," the two-member board of psychiatrists noted that she "has some hysteroid and obsessive-compulsive character traits which tend to get her into trouble at times of crisis." CA JA 86. The doctors at NRMC characterized petitioner's major area of difficulty as "extreme indecisiveness," and noted that, "when stressed, she tends to lose her objectivity and her hysteroid traits become prominent." *Ibid.* The NRMC board gave petitioner an opportunity to comment on its decision (*id.* at 87), and her comments, along with the psychiatric evaluation, are part of the administrative record. *Id.* at 88-93.

2. In 1982, petitioner sought additional special pay (ASP), extra remuneration that a medical officer normally receives after agreeing to remain on active duty for at least one additional year. See 37 U.S.C. 302(c)(1). Based on the denial of petitioner's clinical privileges and the adverse fitness reports, petitioner's commanding officer recommended that her request for ASP be denied for the period from July 1, 1982, until June 30, 1983. A review board approved that recommendation, and further determined that ASP should also be denied for the period from July 1, 1983, until June 30, 1985. In addition, petitioner was passed over for promotion to captain in 1986. *Voge*, 844 F.2d at 777-778.

3. In 1985, petitioner sought relief from the Board for Correction of Naval Records (BCNR) under 10 U.S.C. 1552. Petitioner requested, among other things, that her records be corrected (1) to delete references to actions taken to revoke and deny her clinical privileges; (2) to show favorable action on her request for permanent clinical privileges; (3) to delete all references to the psychiatric evaluations by Dr. Tinelli and by the NRMC in San Diego; (4) to remove adverse fitness reports; (5) to

show that she was entitled to ASP; and (6) to order her to be considered by a special promotion board for promotion to captain. Pet. App. 37-39.

In a decision dated February 4, 1986, the BCNR recommended correction of portions of two of the adverse fitness reports, but concluded that the reports were otherwise not "substantially erroneous or unfair" and that petitioner's selection for promotion would have been "unlikely" even with the corrections the BCNR made to her records. Pet. App. 48-50. The BCNR found that petitioner had been "treated fairly" in the decredentialing process. *Id.* at 49. Based on the BCNR's recommendation, the Secretary of the Navy approved the deletion of specific references to pending administrative action in one fitness report and the removal of another fitness report, and denied petitioner's other requests for relief. *Voge*, 844 F.2d at 778.

Petitioner then filed suit in the Claims Court, seeking essentially the same relief she had requested from the BCNR. Based on procedural errors in the denial of ASP to petitioner, the United States did not oppose the Claims Court's issuance of a judgment for three years' worth of retroactive ASP in the amount of $30,000.[3] The United States moved for dismissal of petitioner's remaining claims on the ground that they were beyond the jurisdiction of the Claims Court.

That court granted judgment for petitioner in the amount of $30,000, and held that it did have jurisdiction to

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[3] The BCNR had erroneously considered information post-dating the denial of ASP and, for two of the three years' denial, a required recommendation from petitioner's commanding officer regarding denial of ASP had not been issued. *Voge*, 844 F.2d at 778; see also U.S. Br. in Opp. at 3 n.2, *Voge* v. *United States*, No. 88-81.

review petitioner's service records as part of its review of the denial of ASP. After reviewing the administrative record, however, the court found no error in the preparation or composition of the fitness reports, and it declined to second-guess the judgments of petitioner's superiors as to her medical and military competence, as reflected in the fitness reports and the denial of clinical privileges. The court also held that petitioner had no right to reconsideration of her nonselection for promotion, and denied petitioner's requested relief. *Voge* v. *United States*, 11 Cl. Ct. 510 (1987).

The Federal Circuit affirmed the judgment for ASP, but vacated that part of the Claims Court's decision that purported to review petitioner's military records as beyond that court's jurisdiction. *Voge* v. *United States*, 844 F.2d 776 (1988). This Court denied certiorari. 488 U.S. 941 (1988).

4. Petitioner then filed suit in district court against the Secretary of the Navy seeking review of the BCNR's February 4, 1986, decision pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* On January 12, 1990, the district court denied both the Navy's motion for summary judgment and its motion to dismiss. Pet. App. 7-8. The court remanded the case to the Secretary of the Navy so that the BCNR could reconsider the issues raised in a May 24, 1985, statement submitted by petitioner. *Ibid.*; see CA JA 211. In pertinent part, that statement claimed that Dr. Tinelli had told petitioner in August, 1982, that he gave her a psychiatric diagnosis because he had been ordered to do so by Capt. Bramlett and that Capt. Bramlett had been ordered to do so by

BUMED. *Ibid.*[4] The district court explicitly rejected petitioner's assertion that the Navy violated her due process rights by failing to adhere to its own Fair Hearing Plan.

On remand, the BCNR again denied relief in a decision dated October 5, 1990. Pet. App. 53-55. The BCNR specifically was unable to find that Dr. Tinelli's report was the result of "coercion." *Id.* at 54. Petitioner asked the BCNR to reconsider its decision, and, on March 4, 1993, the BCNR again denied relief, finding that the evidence submitted was insufficient to establish that material error or injustice had occurred. *Id.* at 56-58. Before denying relief, the Board sought and considered an advisory opinion by Capt. John M. Mateczun, a Navy Specialty Advisor for Psychiatry, evaluating Dr. Tinelli's diagnosis. *Id.* at 59. The BCNR also considered petitioner's application, together with all materials submitted in support thereof, and petitioner's entire file to date.[5]

Once again, petitioner appealed the BCNR's decision to the district court, and the district court granted summary judgment for the Navy. Pet. App. 31, 32-36. The district court concluded that Dr. Tinelli's 1982 psychiatric report was not command influenced, that the BCNR properly reviewed petitioner's allegations on

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[4] The district court referred to the issue raised in the May 24 statement as the command influence issue. For convenience and consistency, we use that term as well.

[5] Among the materials submitted by petitioner and considered by the Board in its March 4, 1993, decision were two psychiatric evaluations performed in 1992 by Drs. Costello and McGuire, and a letter from Dr. Tinelli, who was no longer in the Navy, dated October 30, 1990. Dr. Tinelli, like Capt. Bramlett, unequivocally denied any commend influence. Pet. App. 4, 56; Pet. 5-8.

remand, and that it did not act arbitrarily or capriciously in denying relief to petitioner. *Id.* at 33-34.

The court of appeals affirmed (Pet. App. 1-7), concluding that "the BCNR's decision was not arbitrary and capricious." *Id.* at 5.[6]

ARGUMENT

1. Petitioner argues that the court of appeals improperly refused to review the portion of the district court's 1990 decision rejecting petitioner's claim that the Navy violated its own Fair Hearing Plan in decredentialing petitioner on Guam. Pet. 11-12.[7] Petitioner asks this Court to determine (Pet. I) whether her failure to appeal the district court's 1990 remand order constituted a waiver of all issues except those involved in the remand. The decredentialing issue, however, was presented to the court of appeals in petitioner's briefs and oral argument, and the court of appeals appears to have considered it. The waiver question presented by petitioner is therefore not presented by this case.

The Navy's brief in the court of appeals suggested (at 13 n.9) that that court should decline to address issues other than those involved in the 1990 remand. See Pet. 9-10. However, petitioner's reply brief contended that the Fair Hearing Plan/decredentialing issue was properly before the court of appeals, see Pet. 10, and the

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[6] The court of appeals noted, with regard to the command influence issue, that Capt. Bramlett denied the allegation that he had been ordered to refer petitioner for a psychiatric evaluation and that Dr. Tinelli denied the allegation that he was ordered to make a particular diagnosis of petitioner. Pet. App. 4.

[7] The Board found that petitioner had been treated fairly in the decredentialing process (Pet. App. 49), and the district court found that petitioner had been given the process that was due her. Pet. App. 12, 29.

government conceded at oral argument that "[t]he Fair Hearing Plan[,] or the due process claim, * * * [is] properly before the Court." Tr. 19.[8] The Fair Hearing Plan/decredentialing issue was, moreover, fully explored by both counsel at oral argument and was the subject of several questions by the court of appeals. See Tr. 4-6, 27-31. And although the court of appeals did not address the Fair Hearing Plan/decredentialing issue in its opinion, the opinion affirmatively indicates that the court did not confine its review to the command influence issue: "The question on appeal is whether the trial court properly held that the decision of the BCNR was not arbitrary, capricious, or unsupported by substantial evidence *and* that the decision complied with its January 1990 [remand] order to review and resolve the issues raised in [petitioner's] letter dated May 24, 1985." Pet. App. 3 (emphasis added).

2. On the merits, petitioner claims that the court of appeals improperly failed to insist that the BCNR "render a rational account of the *entire* record." Pet. 14. Petitioner asserts that that failure violated the command of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487-488 (1951), that the agency base its decision on the record as a whole and that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

"[I]n an effort to prove that [petitioner] did not suffer from any mental illness," Pet. 5, petitioner submitted psychiatric evaluations performed in 1992 to the BCNR before the BCNR's March 4, 1993, decision. CA JA 422-427; see *id.* at 401-411, 415-421. In that decision, the BCNR explicitly stated that it considered petitioner's

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[8] "Tr." refers to the transcript of the May 5, 1994, oral argument held in the Fourth Circuit.

application, "together with all material submitted in support thereof." Pet. App. 56. Petitioner's contention that the BCNR "totally disregarded [the psychiatric reports] in its reconsideration on remand" (Pet. 8) is, consequently, inaccurate.

In addition, the psychiatric evaluations submitted by petitioner were not relevant to the command influence issue before the BCNR pursuant to the district court's remand order. Nor did they detract from the Board's repeated conclusions that the Navy followed proper procedures, and that Dr. Tinelli's evaluation was properly performed and valid. The district court expressly found that the BCNR's failure to address the hindsight opinions expressed in the psychiatric evaluations "do not alter the court's view as to the arbitrary or capricious nature of the Board's decision." Pet. App. 34.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ANTHONY J. STEINMEYER
MARC RICHMAN
Attorneys

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